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No. 96-559

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

INTERVINE OUTDOOR ADVERTISING, INC.,
Petitioner,

vs.

CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT & CITY OF GLOUCESTER CITY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

OPPOSITION BRIEF OF RESPONDENT, CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT, TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1) Where the state court decisions rest upon clearly stated adequate and independent state grounds that the Gloucester City Zoning Board properly denied a billboard company's application for use and bulk variances under N.J.S.A. 40:55D-70(c)(d), and was not arbitrary, capricious, or unreasonable, and that the City's Master Plan and Zoning Ordinance were properly reviewed and readopted under N.J.S.A. 40:55D-89-89.1, whether this Court has jurisdiction to review the New Jersey courts' resolution of constitutional issues.

2) Whether this Court should exercise its discretion to review a petition for a writ of certiorari when the New Jersey courts properly upheld the constitutionality of the Gloucester City Zoning Ordinance insofar as it regulates commercial speech, thereby creating no conflict with any federal or state court decisions, such that a billboard company's application for use and bulk variances to erect billboards, being in derogation of the entire zoning scheme, was properly denied.

3) Does a business that derives income by renting space on its billboards have standing to claim a noncommercial speech violation, and if so, whether the denial of its use and bulk variances to erect billboards, still being in

derogation of the entire zoning scheme, was proper, when the New Jersey court unequivocally held that only a time restriction contained in the noncommercial sign provisions of Section 1604, subsection 12 of the Gloucester City Zoning Ordinance would be severed as unconstitutional, and held that the remainder of both noncommercial and commercial sign regulations survive.

4) In the event that this Court determines that the sign provisions of the Gloucester City Zoning Ordinance are unconstitutional as applied, is it fair to allow a billboard company to erect its billboards without Gloucester City being afforded a reasonable time to amend its Ordinance, when the billboards are still in violation of the entire zoning scheme.

CITATIONS OF THE CASE BELOW

The Supreme Court of New Jersey, which is the state's highest court, denied Intervine's Petition for Certification and dismissed the appeal by Order dated July 10, 1996 (C-1232, September Term 1995, 42-339), found at page A-1 of Petitioner's Appendix.

The Superior Court of New Jersey, Appellate Divison, issued its written Opinion and Order on May 2, 1996 (A-5193-94T3) which has been published and reported at 290 N.J.Super. 78 (App.Div. 1996); the Opinion is reproduced beginning at page A-2 of Petitioner's Appendix.

The Appellate Division affirmed the April 14, 1995 trial court Judgment of the New Jersey Superior Court, Law Division, (Docket No. L-013091-92), which Judgment and written Opinion are submitted under separate cover entitled "Lodging".

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction because the state court decisions below rest upon clearly stated adequate and independent state grounds.

STATUTORY PROVISIONS INVOLVED

1. Gloucester City Zoning Ordinance, ARTICLE XVI, SIGNS, SECTIONS 1601-1605, found beginning at page A-11 of Petitioner's Appendix.

2. Gloucester City Zoning Ordinance, ARTICLE IV, GENERAL PROVISIONS, SECTION 412.00, Shoreline Overlay District, pages 2-3 herein.

3. Gloucester City Zoning Ordinance, ARTICLE IV, SECTION 415.01, Sign Standards in shoreline district, page 3 herein.

4. Gloucester City Zoning Ordinance, ARTICLE XXV, SECTION 2501, severance clause, pages 8-9 herein.

5. N.J.S.A. 40:55D-70(c)(d)

6. N.J.S.A. 40:55D-89-89.1

7. Gloucester City Master Plan Goal, page 4 herein.

8. Gloucester City Master Plan Objective F and Means 4 of Objective F, page 4 herein.

9. Gloucester City Master Plan, Objectives B, C, D, G and J, page 29 herein.

10. Gloucester City Master Plan WATERFRONT REVITALIZATION section, page 4 herein.

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COUNTERSTATEMENT OF THE CASE

Intervine's complete mischaracterization and glaring omission of salient facts as well as the findings of the New Jersey courts in this case is outrageous. It is but a continuation of a red hearing strategy that grows with each of its appeals and is designed to distort and obfuscate the issues because Intervine's position is not legally supportable. None of the three New Jersey courts that reviewed this appeal were impressed with Intervine's strategy, and this Court should not be, either.

In a sneaky attempt to circumvent the validly enacted, well-organized zoning scheme in Gloucester City as set forth in its Master Plan, Zoning Ordinance, and Regulations because the site of the proposed billboards is in complete derogation thereof, Intervine grossly distorts to this Court the character of Gloucester City in general, as well as the location and impact of its proposed billboards in particular, even arguing for the first time here that its three, towering billboards, measuring a total of 2880 square feet, each externally lit at the bottom, **within** and over the City, "would only be viewed by bridge traffic," which Intervine well-knows is completely untrue. App.Div. Opinion, Intervine's Appendix, hereinafter "IA", at A-4; Trial Ct. Op., pp.2-4 (See "Lodging" submitted under separate cover); <u>infra</u> at p.5.

Moreover, the fact that there are billboards on the Philadelphia side of the bridge is completely irrelevant to the case at bar since Philadelphia, the fourth largest city in the country, is not only

entirely different in character, size, and population from Gloucester City, a small, residential town of approximately 13,000 population, but it is grossly misleading since the proposed billboards herein are in total derogation of the Gloucester City Master Plan, Zoning Ordinance and Regulations as held by the New Jersey courts in their affirmance of the Zoning Board's denial of a variance under N.J.S.A. 40:55D-70. IA-3-5; Trial Ct.Op., 2-11 (See Lodging).

As the trial court found, based upon extensive hearings before the Zoning Board (herein after "Board") on October 8 and November 12, 1992 (approximately 200 pages, transcribed), the

> "primarily residential city with a substantial portion being welfare dependent...is trying to recapture its historical significance and is in the process of developing the...area which is one of the entry ways to the city and is very close to the area in dispute." Trial Ct.Op.p.4; See Lodging.

Ignored by Intervine in all of its Briefs is the fact that the site of the billboards, as the New Jersey courts found, IA-4, is also located in the Shoreline Overlay District, which, pursuant to the Zoning Ordinance, ARTICLE IV, GENERAL PROVISIONS, SECTION 412.00, "shall include all lands within five hundred feet of all Delaware River shorelines of the City." It further provides:

"It is the purpose of this section to (1) protect the ecosystems of the shoreline areas, (2) encourage water-dependent uses, (3) provide for maximum public use and enjoyment of the shorelines of the City, and (4) preserve, enhance, and increase views of the water and access to the water."

Thus, not only are billboards clearly incompatible with the purpose of the Shoreline Overlay zoning district, but they are **prohibited** under the sign standards applicable to all signs in the shoreline district at ARTICLE IV, SECTION 415.01, which in addition to the sign regulations contained in Article XVI (IA-11-17), require that

" * * * *

3. Pole signs shall be permitted only on piers or floats which lack buildings for wall-mounted signs and only to provide visibility from a navigational fairway for water-dependent or water-related business establishments.

4. Ground mounted signs are permitted when not located in water view corridors or in an area which impairs visual access to water view corridors."

The Master Plan was passed in 1986 and the New Jersey courts held that it, along with the Zoning Ordinance and

Regulations, were validly reviewed, reexamined and readopted by the City pursuant to N.J.S.A. 40:55D-89-89.1, and thus, were in effect at the time of Intervine's billboard application. IA5-6. The stated Master Plan goal, first drafted in 1984, is **"shift image of Gloucester City from industrial town to desirable residential community."** Several stated objectives to reach that goal include "F. **Clean up and beautify entrances to the City,"** one being the Walt Whitman Bridge to which Intervine refers; also, **Means 4 of objective F is "Prohibit new billboards and attempt to retire old ones."** (Emphasis added). Not one shred of evidence has ever been submitted that these goals or objectives have ever changed to this day, as the New Jersey courts found. IA-4.

Further evidence contradicting Intervine's misleading assertions that the billboard situs is "fully urban and industrialized" is contained in the Plan's "WATERFRONT REVITALIZATION" section:

> "The waterfront represents a significant natural and economic resource for the City of Gloucester for recreational boating, pedestrian promenades and potential sites for water-front restaurants, housing and offices. The City has designated the waterfront south of Monmouth Street to the Big Timber Creek as an area for the development of the aforementioned uses."

Intervine applied for use and bulk variances under N.J.S.A. 40:55-70(d) and (c), respectively, seeking relief from ARTICLE XVI, SIGNS, SECTIONS 1603.2, 1603.5, 1603.6, and 1603.12, of the Zoning Ordinance. (See IA-13-14 and Trial Ct.Op. at 8). At the extensive hearings held before the Board on October 8 and November 12, 1992, during which Intervine, as it well knows, was represented by counsel, several residents vociferously expressed their objections and heart-felt dismay over their legitimate traffic safety and aesthetic concerns **since they live at and near the proposed site,** and thus would obviously "view" these billboards along with most of the City residents every day of their lives, contrary to Intervine's totally false assertions that only bridge traffic will "view" the billboards. See, e.g., resident who lives 30 feet from site ("Lodging," pp.23-24); resident who lives near site ("Lodging," pp.25-27); resident who testifies billboards would be in front of his, as well as "all our homes" ("Lodging," p.28); and resident arguing with Intervine witness that the billboards would be across the street from residences ("Lodging," p.29). Also see Trial Ct. Op., p.3.

Thus, the Board testimony further illustrates why billboards are incompatible with this zoning district, and why Intervine's relief should not be granted, as the New Jersey courts' well-reasoned opinions found.

In upholding the Board's denial of Intervine's variance application based upon the extensive Board hearings, the New

Jersey courts held the denial was substantially supported by the evidence and thus, was not arbitrary, capricious, or unreasonable, being in complete derogation of the City's validly enacted Master Plan, Zoning Ordinance and Regulations. IA-5-6; Trial Ct.Op., pp. 3-11.

The trial court was reluctant, citing the doctrine of strict necessity, to analyze Intervine's constitutional argument. Op., pp.11-14. Out of "prudence," it did so after an exhaustive "Bell hearing" held on February 22, 1994 (approximately 101 pages, transcribed) pursuant to Bell v. Stafford Township, 110 N.J. 384 (1988), grossly misstated and misapplied by Intervine. The Board, but not Intervine, presented witnesses who testified about the factual basis for why billboards were prohibited under the Zoning Ordinance when first passed in 1987, being contrary, for aesthetic reasons, to the entire zoning scheme; the courts below also finding that traffic safety was another legitimate, substantial governmental interest. Trial Ct. Op.,15-16; IA-7. Even **absent** a specifically stated objective, Bell makes clear that "several possible interests can be **hypothesized** as objectives of the Ordinance." Bell, supra, at 396 (emphasis added). Moreover, the Delaware River Port Authority, the owner and operator of the Bridge (Trial Ct. Op.,p.3) specifically objected to the billboards based upon traffic safety concerns. Trial Ct.Op., pp.15-16.

As the Board argued below at the "Bell" hearing, the lower courts obviously agreeing, the Zoning Ordinance does not restrict any other modes of communication except huge billboards; other modes of communication are left open for **all** speech, and are **not** regulated by the Ordinance, including smaller signs that can be placed inside windows, newspapers, direct mailings, radio and television advertising, as well as 13 categories of larger permitted signs, including those containing noncommercial speech at Section 1604.12 (IA-16). Thus, each one of Intervine's counsel's esoteric examples of what possibly could ever be put on any sign in the universe, as argued in the Petition as not being allowed under the Ordinance, would in fact, be allowed.

Finding that the credible, extensive Bell testimony elicited by those who drafted the Master Plan, Zoning Ordinance and Regulations demonstrated legitimate City objectives (aesthetics, preservation of property values, and traffic safety) genuinely served by the billboard ban, the trial court, in an extensive, well-reasoned Opinion that correctly applied the standards as set forth in Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d. 341 (1980) and Metromedia v. San Diego, 453 U.S. 490 (1981) and their progency, upheld the constitutionality of the Ordinance regarding the regulation of commercial speech with respect to the sign regulations, finding that it was "clearly shown that a sufficiently substantial governmental interest is furthered by the scope of the ordinance;" Trial Ct. Op. at

19, "not because argued by Intervine, but inferentially determined by the trial court" that the Ordinance's limitations on size, and of advertising subject matter relating to the use of the business located on the property, did not violate Intervine's commercial speech rights. Op., pp.11-21. Since Intervine, a commercial speech applicant, lacks standing to raise noncommercial speech questions, the trial court properly declined to determine them, but held that even such an attack was without merit since Section 1604.12 (IA-16)

> "cover(s) such a broad area of possible human discourse, that a conclusion that it infringes upon applicant's First Amendment rights is not reasonably supportable." Op. at 20-21.

The Appellate Division affirmed the judgment in Respondents' favor, and also affirmed the trial court's ruling that Intervine's commercial speech rights are not violated by the Ordinance. IA-6. However, it found unconstitutional one part of the sign regulations limiting noncommercial speech to a temporary basis, which appears at Section 1604.12 of the Ordinance (IA-16). IA-8-9.

Observing the severance clause of the Ordinance, ARTICLE XXV, SECTION 2501, that provides:

> "Should any section or provision of this Ordinance for any reason be declared invalid by the Court, such decision shall not

> affect the validity of this Ordinance as a whole or any other part thereof,"

the Appellate Division held that severing the time restrictions contained in the noncommercial sign provisions of Section 1604.12 "will not preclude noncommercial signs and will not truncate the entirety of the sign provisions into incomprehensibility." IA-10. The Appellate Division made crystal clear, through painstaking analysis, its ruling that only the time restrictions contained in Section 1604.12 were to be severed, and hence unenforceable, as an unconstitutional restriction on non-commercial speech, IA-3-7-8-9-10, finding only that the time restriction was content-specific since there is no similar time restriction placed upon commercial speech anywhere in the Ordinance. Id. Intervine's transparent attempts to attach confusion as to what was severed is appalling.

Moreover, by affirming the judgment in Respondent's favor, the Appellate Division obviously disregarded Intervine's specious argument that its noncommercial speech rights have been violated. No court has ever "held the entire Section 1604.12 content specific" contrary to Intervine's misleading assertions at pp. 3-4 of its petition, the trial court finding that "off site commercial signs may be prohibited while on site commercial signs are permitted," the distinction being an "appropriate one" under Metromedia v. San Diego, 453 U.S. 490 (1981) and its progency. Trial Ct. Op., pp.18-19.

In its continuing appellate effort to confuse commercial and noncommercial speech issues by completely distorting the Record, Intervine pretends that it is the purveyor of public service announcements, despite the fact that it profits, no matter what the message.

Contrary to Intervine's misleading assertions at page three and elsewhere, the lower courts **never** "supported" or "accepted" Intervine's contention that its signs would "clearly display non-commercial speech." The trial court, in fact, completely **disbelieved** Intervine's sudden change of assertion, based upon its honestly stated motive way back at the October 8, 1992 Zoning Board hearing, wherein it admitted its true profit-making motive:

> ". . . we're here to make a profit, but we realize to be profitable, we have to coexist with our neighbors, and in that sense we'd like the people here to know that we are sincere in our application. We're not here to take advantage of anyone. We're here for a profit motive, but that's part of the American way. Everybody here similarly has a job and they do it because they want to make a profit, but we're here also just to acknowledge the fact that we need-- we need relief from the Board, and we also really need relief from the citizens here to

> construct these signs..." (Trial Ct.Op. at 5-7; emphasis in original).

On appeal, and still absent one shred of credible evidence, Intervine argued again that it would seek to "display" non-commercial messages; the Appellate Division merely restates what Intervine **"proposed"** at IA-4, in fact **rejecting** any alleged noncommercial speech violation as applied to Intervine because it affirmed the judgment in Respondents' favor.

Further, as the trial court held with respect to Intervine's non-commercial speech question,

> "the permissible limitation in size is so far removed from what the applicant desires, it can not be held that Intervine's interest with regard to this specific question is even remotely significant, and the applicant has not presented such a position. Also, there is not a shred of evidence that on-site signs covered by the ordinance have ever been used for noncommercial messages nor are such signs at issue in this case. Further, there is no evidence in this case that remotely suggests that the City, by creating these few exceptions, is attempting to influence public opinion or to limit public debate on particular issues. Most assuredly, such conclusion can

not be derived from the face of the ordinance." Op. at p.20.

The Record is replete with evidence, as found by the courts below, of municipal concern about aesthetics, the preservation of property values, and traffic safety, which are "substantial governmental goals" and proper objectives of regulation through zoning, Trial Ct. Op., pp.12-17, IA-7, and the billboard restriction "reaches no further than necessary to accomplish the given objectives" under Metromedia v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) and their progency. Id.

ARGUMENT WHY THE WRIT SHOULD BE DENIED

There are no compelling reasons in this case that would justify this Court's exercise of its discretion to review Intervine's petition for a writ of certiorari. U.S. Sup.Ct.Rule 10, 28 U.S.C.A. The Court should not be persuaded by Intervine's red herring smokescreen strategy contained in its Argument at pp.4-11 of its Petition, which merely parrots the intentionally misleading and misapplied facts and law in this case already presented in its Statement of the Case at pp.1-4; supra at pp.1-12, as well as its knowing mischaracterization of Gloucester City in general, and of the site and impact in particular of its proposed billboards upon the people who live and work in Gloucester City. Id.

The final judgment of the New Jersey Superior Court Appellate Division, IA-2-10, upon which the New Jersey Supreme Court, the state's court of last resort, denied certiorari, IA-1, correctly applied well-settled provisions of federal law already enunciated by this Court, as well as by other federal and New Jersey courts, and does not conflict with any decisions of this Court, or of any other state or federal court. U.S. Sup.Ct.Rule 10, 28 U.S.C.A. Even when the asserted error consists of erroneous fact findings or the misapplication of a properly stated rule of law, a writ is rarely granted. Id. There is little doubt that the New Jersey courts "reached their ultimate conclusions in this case by applying traditional, well-understood principles which does not

transmute this case into one of general public importance. Mahony v. Danis, 95 N.J. 50,51-52 (1983). As it did below, Intervine "invitingly" misframes the issues in this case, and attempts to create confusion in the Appellate Division Opinion, where clearly, none exists. Cf Fox v. Woodbridge Township Board of Education v. Board of Review, 98 N.J. 513 (1985) (dismissing appeal because certification improvidently granted); IA-9,8.

Moreover where, as here, the judgment can rest upon adequate and independent state grounds, which are indicated clearly and expressly, the Supreme Court lacks jurisdiction to review the state court's resolution of federal law issues. Schor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d. 326, on remand 619 So.2d 285, certiorari denied 510 U.S. 1025, 114 S.Ct. 638, 126 L.Ed.2d 596, rehearing denied ___U.S.___, 114 S.Ct. 1142, 127 L.Ed.2d 452 (1992). Further, the Supreme Court is not free to substitute its own interpretation of state statutes for those of state courts. Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555, rehearing denied 501 U.S. 1277, 112 S.Ct. 28, 115 L.Ed.2d 1109 (1991) (Per Justice Souter with the Chief Justice and two Justices concurring and one Justice concurring in the result). The Supreme Court accords respectful consideration and great weight to views of a state's highest court, General Motors Corp. v. Romein, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d. 328 (1992). The proposition that a federal court cannot consider the merits of a federal claim where a state court judgment

rests on a state law ground that is both independent of the merits of the federal claim and serves as an adequate basis for that judgment applies to state court judgments on direct review before the Supreme Court. Turner v. Williams, 812 F. Supp. 1400, affirmed 35 F.3d 872, certiorari denied 115 S.Ct. 1359, 131 L.Ed 216 (E.D.Va. 1993). Further, the Supreme Court has no authority to review state determinations of purely state law, or review federal issues that can have no effect on the state court's judgment. See, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562,566, 97 S.Ct. 2849, 2852, 53 L.Ed.2d 965 (1977).

In the case at bar, the New Jersey Supreme Court, by denying certification, IA-1, has let stand the Judgment and Opinion of the Appellate Division, IA-2-10, which was

> "satisfied, based upon the thorough and well-reasoned letter opinion of Judge Theodore Z. Davis (the trial court) that the Board's denial of Petitioner's application for a use and bulk variance finds support in the evidence and was not arbitrary, capricious, or unreasonable. Booth v. Board of Adj. of Rockaway, 50 N.J. 302, 306 (1967)." IA-5; Trial Ct.Op., pp.3-11.

The lower courts correctly concluded that Petitioner's application for use and bulk variances

> "was a substantial departure from the signage requirements of the zoning ordinance, that the application could not be granted without substantial detriment to the public health, safety, and welfare of the City, and that the Petitioner had not shown any special reasons why the application should be granted in view of the detriments. See N.J.S.A. 40:55D-70d." IA-5.

Additionally, the New Jersey courts below correctly concluded that the City formally reexamined and readopted its Master Plan and Zoning Ordinance in compliance with N.J.S.A. 40:55D-89 and 89.1. IA-A-5-6, also citing Lionshead Woods Corp. v. Kaplan Bros., 243 N.J. Super. 678, 684-85 (Law Div. 1990).

The trial court determined that under the doctrine of "strict necessity" it is not the philosophy of our courts to reach and determine a constitutional issue unless absolutely imperative in the disposition of litigation, citing Donadio v. Cunningham, 58 N.J. 309, 325-26 (1971). Trial Ct.Op. at 11. However, despite the adequate and independent state grounds for upholding the Board's denial of Intervine's application for use and bulk variances, as well as holding that the City complied with New Jersey statutory and caselaw by properly reenacting and readopting Gloucester City's zoning scheme, as well as the court's interpretation of state statutes and New Jersey law, the trial court, out of

prudence only, addressed Intervine's constitutional question because it was made a

> "substantial portion of its argument, although not so in its complaint, and because the question of whether a commercial speech applicant has standing to raise noncommercial speech questions has evolved." Trial Ct.Op. at 13.

Since the Appellate Division judgment also rests upon the same adequate and independent state grounds that are also indicated clearly and expressly, IA-3-6, this Court lacks jurisdiction to review the New Jersey courts' resolution of federal law issues.

Even if this Court determines that it has jurisdiction to review the state courts' resolution of constitutional issues, the judgment should not be disturbed because both courts correctly applied well-settled federal principles already enunciated by this Court as well as by other federal and state courts, and the decisions below do not conflict with, nor do they misapply, any decisions of this, or of any other court, state or federal.

The Appellate Division correctly affirmed the trial court in upholding the constitutionality of the Zoning Ordinance insofar as it regulates commercial speech with respect to the sign regulations. IA-3-6; Trial Ct.Op. at pp. 14-20.

Singer Supermarkets, Inc. v. Hillsdale Board of Adjustment, 183 N.J. Super. 285 (App.Div. 1982), held that an ordinance, such as the one here, which simply limits advertising - commercial speech, is entitled to a lesser degree of protection than other forms of expression. Id. at 288. Analyzing the standards governing the regulation of commercial speech as set forth in Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the court held that the ordinance in Singer was constitutional. Id. at 288-290.

Here, as in Singer, the restrictions on commercial speech imposed by the Ordinance are likewise valid under the four-part analysis of Central Hudson.

First, it is assumed that the proposed billboards will concern lawful activity and not be misleading. Second, the Record is replete with municipal concern about aesthetics and traffic hazards, which are "substantial governmental goals. In this regard, it is firmly settled that traffic safety and aesthetics are the proper objectives of regulation by a municipality through zoning." Singer, supra, at 290: Metromedia Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); State v. Miller, 83 N.J. 402 (1980).

Moreover, it is constitutional for a state to ban signs and billboards as part of zoning laws designated to further aesthetics, preserve property values and promote traffic safety. See, e.g.,

Markham Advertising Co. v. State, 73 Wash.2d 405, 439 P.2d 248 (1968), appeal dismissed 393 U.S. 316, 92 S.Ct. 1126, 31 L.Ed.2d 512, reh. den., 393 U.S. 1112, 89 S.Ct. 854, 21 L.Ed.2d 813 (1969) (cited with approval in Young v. American Mini Theaters, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, reh. den., 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976)).

Thirdly, the regulation directly advances the governmental interest asserted, pursuant to the Master Plan Goal to **"shift image of Gloucester City from industrial town to desirable residential community"** pursuant to the stated objectives including "F. **Clean up and beautify entrances to the City,**" and pursuant to the stated "Means 4. of Objective F., **"Prohibit new billboards and attempt to retire old ones"**. Supra, p.5.

Moreover, Intervine seeks to erect its billboards at the waterfront area, which is right at one entrance to the City, accessible by the Walt Whitman Bridge, an area clearly unsuitable for billboards under the Master Plan, "WATERFRONT REVITALIZATION," supra at p.4, and **prohibited** by the content-neutral sign restrictions applicable to the Shoreline Overlay District, in which the billboards would lie. supra at pp.2-3.

Fourthly, as in Singer, the Ordinance is no more extensive than necessary to serve the City's goals, and also meets the standards enunciated by this Court in subsequent cases. Infra, pp.25-26 herein. In fact, as in Metromedia, supra, the City

could have even gone further than it did because the Ordinance still permits all speech and all modes of communication except huge billboards. Supra at p.7.

As in Singer Supermarkets, Inc. v. Hillsdale Board of Adjustment 183 N.J.Super. 285 (App.Div. 1982), the Ordinance simply limits advertising, commercial speech. Moreover, the City has appropriately distinguished between on-site advertising and off-site advertising, which is constitutionally permissible under Metromedia, in concluding that a "commercial enterprise, as well as the public, has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere."(Trial Court Op. at 11).

As the court stated in State v. Miller, 83 N.J. 402,415 (1980), a municipality may distinguish between commercial and political speech in imposing restrictions on signs, citing Lehman v. Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974). Moreover,

> "the content of a particular advertisement may determine the extent of its protection *** A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere *** The measure of

> constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication."

Miller, supra, at 415-416, quoting Young v. American Mini Theaters, at 427 U.S. 68-69, 96 S.Ct. 2440, 49 L.Ed.2d at 325 (footnotes omitted).

The Record below clearly shows that this primarily residential City has been revitalizing itself and recapturing its historical significance, as indicated through testimony, as evidenced in its Master Plan of 1986, readopted in 1991, and through its Zoning Ordinance of 1987, which conformed to the Master Plan. The older portions of our major urban areas "should not be prevented from taking steps to correct, as best they may, mistakes of their predecessors. Metromedia, supra, 69 L.Ed.2d at 854 (Justice Rehnquist, dissenting).

As State v. Miller, 83 N.J. 402,410 (1980), quoting Metromedia, Inc. v. San Diego, at 592 P.2d 728,748, 154 Cal.Rptr. 212,232 (1979) so aptly stated:

> "(T)o hold that a city cannot prohibit off-site commercial billboards for the purpose of protecting and preserving the beauty of the environment is to succumb to a bleak materialism."

Intervine's hysterical concerns about a "regime" of censorship in Gloucester City was specifically **rejected** by the

trial court, supra at pp.11-12, and finds no support in the Record, Master Plan, Ordinance and Regulations in Gloucester City, nor caselaw. The Gloucester City Sign Ordinance does not create a "total ban" on all off-premises commercial and noncommercial speech, see, e.g., Section 1604.12, and supra at p.7, and is not impermissibly content specific since off-site noncommercial speech is allowed. Id. Intervine's less than sincere concern about what the people who live and work in Gloucester City may say or read on signs there is completely misplaced and also incorrect under the Zoning Ordinance. Id. Intervine only wants its own customers who will **not** be living there to be able to advertise on huge billboards for vast sums of rent. All over Gloucester City, businesses, especially liquor stores, have numerous signs inside their windows which are not prohibited under the Ordinance because they are not signs defined to be regulated. Id. Therefore, Intervine need not worry about Gloucester City's architects, accountants, or roofers, Pet. at 8, and "Peace in Gulf" permitted in City of Ladue v. Gilleo, 512 U.S. 43 (1944) (Intervine's Pet.at p.5) is also clearly allowed under Section 1604.12.

Intervine cynically argues throughout its Petition that the term "noncommercial speech" should apply so as to permit "commercial speech" to be protected in the same manner as noncommercial speech. However, it has no basis to argue that it is the defender of noncommercial speech, and it is untrue that it intends to be its purveyor, there being not one shred of evidence in the Record, only Intervine's

counsel's bald assertions. The fact that the Appellate Division momentarily discussed noncommercial speech issues during oral argument does not translate into an acceptance of Intervine's role as the protector of public service announcements in Gloucester City; Intervine could care less about the residents there. As the trial court so aptly stated, "it is not reasonably supportable" to conclude that the Ordinance infringes upon Intervine's First Amendment rights. Op. at p.20. Intervine gets paid vast sums of rent, no matter what the message. It is hard to imagine that any noncommercial speech not involving commerce would ever be advertised on these billboards.

The Appellate Division correctly affirmed the trial court in upholding the constitutionality of the Zoning Ordinance insofar as it regulates commercial speech with respect to the sign regulations. IA-3-6. Assuming, arguendo, that Intervine even has standing to argue the constitutionality of the sign regulations applicable to noncommercial speech, and further assuming, arguendo, that this Court agrees with the Appellate Division that the temporal restriction contained in the noncommercial sign regulations is unconstitutional, the Appellate Division correctly held that the temporal restriction could be severed from the noncommercial sign regulations under the severance clause of the Ordinance, the remainder of the provisions surviving, including those that regulate commercial speech with respect to signs. IA-9,8,3,7. There is no basis in logic for Intervine's

contention that the Appellate Division Opinion can in any way be interpreted to require deletion of Section 1604.12 in its entirety. The commercial sign provisions can stand in the absence of the time restrictions contained in the noncommercial sign provisions of Section 1604.12, IA-10, and the billboards not only are prohibited under ARTICLE XVI, IA-11-17, but are **still** prohibited under ARTICLE IV, Section 415.01, since the situs would also be in the Shoreline Overlay District. Supra at pp.2-3.

Further, "there is not a shred of evidence that on-site signs covered by the ordinance have ever been used for noncommercial messages, nor are such signs at issue in this case." Supra, p.11. By stating the issues incorrectly, Intervine hopes to "cast doubt upon the integrity of the decisions below. But, in reality, it remains a factual dispute hardly requiring Supreme Court review. Fox v. Woodridge, supra, 98 N.J. 513,515.

Since the state's highest court has denied certification and the Appellate Division struck only the time limitations pertaining to noncommercial speech, letting stand the trial court's broad interpretation of the noncommercial sign speech provisions contained in Section 1604.12 (IA-16), Intervine may now rest easily knowing that anyone desiring to advertise noncommercial speech in Gloucester City may do so without any time constraints, the regulation now being even **broader** than it once was before Intervine mounted its noncommercial speech attack. Supra, p.7. Thus, Intervine's reliance

upon Rappa v. State of Delaware, 18 F.3d 1043 (3rd Cir. 1994) and City of Ladue v. Gilleo, 512 U.S.43 (1994) at p.9 is totally misplaced since **less** is being restricted, not more!

Intervine's reliance upon 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996) and City of Cincinatti v. Discovery Network, 502 U.S. 410 (1993) at pp.8-9 of its petition is misplaced since the Record is replete with evidence, as found by the New Jersey courts, that the Master Plan, Zoning Ordinance, and Regulations do advance a substantial interest in aesthetics, property values and traffic safety, reaching no further than necessary as established by the Record to a material degree, and also establish a "reasonable fit" between its legitimate interest in safety and aesthetics and its choice of means to serve those interests. See Trial Ct.Op. at 15-20 and IA-4,5,7, particularly since the stated objectives of the zoning scheme include "prohibit new billboards and retire old ones," and "clean-up and beautify the entrances to the City," one entrance being the very Walt Whitman Bridge of Intervine's petition!

It is untrue, contrary to Intervine's complaint peppered throughout its Petition that "no less restrictive alternatives were considered," pet. at. 3; See Trial Ct.Op. at pp.8-9; supra at pp.6-7, extensive testimony at Bell hearings; but under City of Cincinatti v. Discovery Network, supra, restrictions on commercial speech are not to be judged on whether they represent the "least-restrictive-

means" of achieving the governmental objective, nor on the basis of whether such restrictions have a "rational basis"; the regulation need not be the absolutely least severe that could achieve the desired end.

As the trial court so aptly stated:

> "a close inspection of the record below indicates that the judgments of the Board and the City are not public rationalizations of an impermissible purpose, but a resolve to revitalize their community and recapture its historical significance...the status of the law is not such that a community must be like historical Williamsburg in order to sustain a prohibition against billboards." Op. at p. 18.

CONCLUSION/RELIEF REQUESTED

Intervine improperly argues that it should be granted a variance by this Court, completely ignoring the fact that the proposed billboards still violate the intent and purpose of the validly enacted Master Plan, Zoning Ordinance, and Regulations, all of which have been upheld by the New Jersey courts with the exception of the time limitation on non-commercial speech contained in Section 1604.12 , which time restriction has been severed, and rendered unenforceable. IA-7-8-9.

The unconstitutionality of even all of the Sections of the Ordinance about which Intervine complains still does not affect the variance denial.

Article IV, SECTION 415.01, sign standards in Shoreline Overlay District, which is where Intervine wants to put its billboards, contain the content neutral requirement that

> "ground mounted signs are permitted when not located in waterview corridors or in any area which impairs visual access to waterview corridors."

This provision alone supports the Zoning Board's denial of a variance supported by the credible evidence of Record. Supra, pp.2-3.

Intervine thus is still not permitted to erect its billboards and the remaining Articles of the Gloucester City Zoning

Ordinance (spanning 94 pages) continue to represent valid, enforceable regulations passing constitutional muster.

Moreover, the variance still fails under Article 16, Section 1603, relating to size, placement, and length of time of illumination. Trial Ct. Op., p.8.

As held by the courts in this state, the Record below is replete with credible evidence that the Zoning Board properly denied Intervine's variance application and was not arbitrary, capricious, or unreasonable, the Board concluding, upon credible evidence, that the application was a substantial departure from the sign requirements of the Ordinance, that there would be a substantial detriment to the public health, safety, and welfare of the City if the variances were granted, and that Intervine failed to show any special reasons why they should be granted in view of the detriments under N.J.S.A. 40:55D-70d. IA-5; Trial Ct. Op., pp. 3-11. On this basis alone, this Court lacks jurisdiction to consider the lower courts' application of constitutional issues. Supra, pp.5-6 and 14-16.

Moreover, there are no compelling reasons why this Court should exercise its discretion to review Intervine's petition for a writ of certiorari, its commercial speech rights not being violated, as properly determined by the courts below, supra, pp.13-26, as well as the fact that Intervine not only lacks standing to launch a noncommercial speech attack, but even these alleged interests are not

violated by the Ordinance, as the lower courts properly held. Id.

Intervine's reliance upon Bell v. Stafford Township, 110 N.J. 384 at p.10 of its Petition is (not surprisingly) misplaced. In Bell, the town completely failed to demonstrate any factual basis for the total municipal-wide ban upon billboards, unlike the situation here, where the Record is replete with evidence that billboards were banned for aesthetic and traffic safety reasons, substantial, settled governmental goals under established caselaw. Trial Ct. Op., pp. 16-18; supra, at pp.6-7.

The fact that Intervine's proposed billboards still violate the intent and purpose of the validly reexamined and readopted Master Plan is yet another basis upon which its variance application was properly denied.

There is not one shred of evidence that the Board intended to change its Master Plan Goal to "SHIFT IMAGE OF GLOUCESTER CITY FROM INDUSTRIAL TOWN TO DESIRABLE RESIDENTIAL COMMUNITY," nor to change its "Objectives" to reach that goal, which include "B. Demolish or rehabilitate "run-down buildings; C. Refurbish and beautify older homes and enforce codes; D. Preserve and accentuate historic structures; **F. Clean up and beautify entrances to City;** G. Screen and buffer unsightly facilities; and J. Provide areas for new residential development" (emphasis added).

Most telling is the fact that there is not one scintilla of evidence that the City intended to change its Objective F. with respect to cleaning up and beautifying entrances to the City which is where Intervine wants its billboards, by "MEANS 4. **Prohibit new billboards and attempt to retire old ones.**" There was also ample testimony at the Bell hearings held below (pursuant to Bell v. Stafford Township, 110 N.J. 384 (1988) criteria) proving the City's intent to continue to revitalize itself as a residential community, and, as the trial court found, "trying to recapture its historical significance." Op. at p.4; supra, pp.2-8.

Moreover, the 1987 Zoning Ordinance established the Shoreline Overlay District, which includes all lands within 500 feet of all Delaware River shorelines of the city, which is where Intervine wants its billboards. Clearly, the Ordinance's prohibition of signs which impair visual access to water view corridors found at ARTICLE IV, SECTION 415.01, supra at pp.2-3, is facially consistent with the Master Plan's means of prohibiting new billboards in order to clean-up and beautify city entrances.

Thus, it would be unfair if the Court did not afford Gloucester City an opportunity to cure any defect in its Ordinance which otherwise would permit Intervine's billboards, as in Exxon Company, USA v. Livingston Township in Essex County, 199 N.J.Super 470 (App.Div. 1985), where the township was permitted to

amend its ordinance to constitutionally achieve its objectives.

Intervine, whose only honestly stated objective way back at the Zoning Board hearings was to make lots of money, as the trial court held, Op.,p.5 supra, pp.10-11, and who could care less about the people who live and work in Gloucester City, should not be permitted to use the First Amendment to allege a noncommercial speech violation to obtain indirectly what it can not obtain directly. All of its noncommercial speech proclamations are after-the-fact attempts in its Briefs to cloud the issues in this case, and if the Gloucester City Ordinance had permitted billboards conveying only commercial messages, Intervine never would have complained.

For all of the foregoing reasons, this Court should deny Intervine's Petition for a Writ of Certiorari.

Respectfully submitted,

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November 7, 1996